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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/725,120	12/02/2003	Eric T. Best	88265-7618	3342
29157 7590 05/30/2007 BELL, BOYD & LLOYD LLP P.O. Box 1135 CHICAGO, IL 60690			EXAMINER PADEN, CAROLYN A	
			ART UNIT 1761	PAPER NUMBER
			NOTIFICATION DATE 05/30/2007	DELIVERY MODE ELECTRONIC

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

PATENTS@BELLBOYD.COM

## Office Action Summary

Application No.

10/725,120

Applicant(s)

BEST ET AL.

Examiner

Carolyn A. Paden

Art Unit

1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 07 March 2007.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-22 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-22 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                       | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-6, 15 and 16 are rejected under 35 U.S.C. 102(b) as being anticipated by Jeffery (4,081,559) for reasons of record.

Jeffery et al disclose a shaped heat-resistance chocolate product containing an edible fat, sugar (abstract) and an emulsifier (column 2, line 12). The product contains individual fat particles, which are separated from one another in a sugar glass so that fat seepage from the product at elevated ambient temperatures is obviated (abstract). Jeffery et al also disclose that the chocolate product has little chance of fat seepage until temperatures is sufficiently high to melt the sugar glass itself (for example 160 to 180F or 70-80C)(column 3, lines 47-50). Thus the product would be expected to retain its shape and appearance at temperatures up to 40C, as required in claim 1 and the product would become flowable at temperatures above 45 C, as required in claim 3. A low water activity

would have been an expected of a chocolate product that contains very little water in it.

With regard to claims 4-6, Jeffery et al disclose sucrose as a form of sugar in the chocolate product (column 4, table 1). Jeffery et al. also disclose that the sugar could be glucose solids (column 6, lines 52-54).

With regard to claims 2 and 16, Jeffery et al disclose that the product can be utilized in conventional chocolate enrobing (column 3, lines 32-36). In addition, Jeffery discloses that wafers enrobed with chocolate (column 3, lines 63-66).

Applicants' arguments relating to the amendment of February 6, 2007 and Declaration of March 3, 2007 were addressed in the advisory action of March 5, 2007. Applicant has argued that Jeffery does not disclose a liquid fat or oil as a component part of his product, but rather discloses a solid fat. Fat, by definition, is solid. So a liquid fat would be expected to be a warmed fat. Applicant argued that the fats are not liquid at room temperature but the claims do not require this feature. Applicant argued that adhesion resistance is not achieved in Jeffery but this property is not a part of the claims. Further, one would expect an adhesion resistance in

Jeffery because the chocolate wafers at the bottom of column 3 do not adhere to one another.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-10, 12-14 and 16-22 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kincs (US 5,108,769).

Kincs discloses structured fat emulsions in confectionery coatings. The coating contains a triglyceride component, a polyol component and an emulsifier. The triglyceride component is described at column 4, lines 11-31 and includes soybean fat and coconut fat, as required in claim 7. The polyol component is described at column 3, lines 54-68 to include sugar and glucose syrups, as required in claims 4-5. In example 1, the emulsifier is a mono-di-emulsifier system. The flowable temperature of the coating is shown in example 2 to be at 120F (49C). Stabilizers are mentioned as added ingredients at the bottom of column 2. The claims appear to differ from Kincs in the recitation of the specific matrix system of sugar crystals. Although the specific matrix system of sugar crystals of claim 1 is not

mentioned, the fact that the coating can resist deforming upon storage for 24 hours at 100F (column 4, lines 56-57) clearly suggests that the sugar in the composition performs this function. It is appreciated that maltodextrin is not mentioned in Kincs but no unobvious or unexpected result is seen from the selection of the specific stabilizers of claims 9 or 12. Also no unobvious or unexpected result is seen from the sugar crystal size of claim 14 or by the extent of sugar that is present as a crystal in claim 13.

Claims 1-22 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

It is not seen that any and all amounts of fat, sugar and emulsifier are effective to provide for a desired fudge article. An amendment to the claims setting forth the range of ingredients that are in the product would overcome the rejection.


Claim 11 would be allowable if rewritten to overcome the rejection(s) under 35 U.S.C. 112, 2nd paragraph, set forth in this Office action and to include all of the limitations of the base claim and any intervening claims.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Carolyn A Paden whose telephone

number is (571) 272-1403. The examiner can normally be reached on Monday to Friday from 7 am to 3:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano, can be reached on (571) 272-1398 or by dialing 571-272-1700. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

  
CAROLYN PADEN 5-24-07  
PRIMARY EXAMINER 1761